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Dean's Desk: A troubling focus by the ABA on the bar exam

Austen Parrish November 16, 2016

For those in legal education, the bar exam has oddly emerged as a key focus. The ABA's Council of the Section of Legal Education and Admissions recently recommended a new accreditation standard. If the ABA's House of Delegates approves it in February, law schools with a bar pass rate below 75 percent over a two-year period could lose their accreditation. This proposal has teeth, particularly as the pass rate in many states has plummeted. In Indiana, the pass rate fell to 64 percent from 75 percent just one year ago.

These new standards don't directly affect the Maurer School of Law: 89 percent of our graduates passed the most recent Indiana bar exam on their first attempt. But a renewed over-emphasis on the exam is troubling. If sounder minds prevail, the ABA House of Delegates will vote down the council's recommendation.



DEAN'S DESK
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First, a bar exam focus is problematic because for many states it no longer tests fundamentals and minimum competency. To pass, students are required to memorize a vast number of esoteric legal principles, many of which they will never encounter as a lawyer. The exam also has little to do with practice. It simply tests the ability to take tests. For some states, the exam is a way to protect in-state lawyers by excluding competition from new and out-of-state attorneys.

California is a good example of protectionism, where the overall pass rate is often under 50 percent. In July 2014, 33 new graduates of Yale Law School sat for the California bar exam, and only 76 percent passed. Only 78 percent of the first-time test-takers from Columbia passed; 77 percent from University of Chicago Law School; 70 percent from University of Virginia School of Law, and so on. For the July 2015 exam, pass rates from good schools including Emory, Vanderbilt and Minnesota were at 50 percent and below. In 2005, the California bar examiners failed Kathleen Sullivan, the former dean of Stanford Law School, a partner at the prestigious Quinn Emanuel firm, and an advocate before the U.S. Supreme Court. Not minimally competent? Please.

Second, it's odd to use the bar exam as a yardstick for measuring educational quality. Too much focus on the exam has the potential to *reduce* the quality of legal education. It puts pressure on schools to spend more time on rote memorization and to teach to the exam, instead of focusing on critical analytical and other lawyering skills. It also potentially reverses trends in schools to offer a wider array of skills and professional development opportunities. These curricular options help make for great practitioners, but offer little help in mastering multiple choice tests.

Third, too much focus on the bar exam will increase costs. Because there's little evidence that overall pass rates improve when students' test-taking abilities improve, teaching to the test is a zero-sum game. Even schools with highly credentialed students may see their average scores decline if other schools sink

more resources into test preparation, regardless of educational benefit. In places like New York, Florida and California, we've already seen an arms race of bar-preparation services.

Fourth, by allowing state bars to set a standard that purports to define educational quality, the ABA directs power from a national level to a local one. That's odd too, given that the ABA has been concerned about populous states trying to set local bar standards that undermine national ones.

The bigger problem, however, is that this debate actually has little to do with educational quality. It's all about admissions. The 75-percent rule is designed to prevent schools from admitting students with lower standardized test scores whom some deem to be incapable of succeeding. The concern is motivated by good intentions. The worry is over those students who take out significant debt, but have slim chances of becoming lawyers. If the ABA House of Delegates approves the new rule, it's because the ABA believes students with lower LSAT test scores should be denied opportunities for their own good.

But consider what this means. There's little evidence that students choosing to attend law school don't understand the risks and the potential rewards. On the contrary, there's never been greater transparency and more data to help would-be students make informed choices. Students who attend law school likely rely on what the data show: most law graduates value their degrees, do well in the long run, and enjoy more financial success than if they had never attended. For some, attending law school is the wrong decision. Yet rarely have we been so openly paternalistic as to suggest the ABA should make this decision for them.

Some justify the paternalistic approach by pointing to the least selective law schools and arguing that they are exploitive when they accept students with low credentials. This may be a valid concern for a very small number of schools. Even so, no one is forcing students to enroll. Using this as a reason for the revised accreditation standard again requires assuming that those who believe that attending law school will improve their lot in life are naïve, that neither they nor their families can be trusted to make sound decisions. It's a patronizing argument that should sit with us uneasily, even more so because most often those labeled as needing saving are from immigrant, minority and less-privileged backgrounds.

And that's what the ABA House of Delegates should be considering. If the ABA's real aim is to withdraw accreditation from certain schools it believes are predatory, then let's be transparent about it. The ABA should be clear, however, that its current very roundabout strategy for achieving this goal will have collateral consequences — negatively affecting schools with strong educational programs that are in protectionist states with difficult exams.

The most vocal advocates have made careers out of calling for all but the most elite law schools to shut down, and they will be pleased. But there's no doubt this rule will hurt diversity in the profession. And it will embrace what most in the past have viewed as absurd — encouraging teaching to the test, placing even more emphasis on the LSAT, and forcing less elite schools to look not for good future lawyers but for good test-takers. And, most troubling, the ABA will have taken the position that adults with lower test scores should be denied access to a legal education because they can't be trusted to make sound decisions about their own futures. If clearer heads prevail, the House of Delegates will reject this elitist and patronizing view of tomorrow's lawyers. •

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